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## Filling the Illinois Federal District Court Vacancies

Carl Tobias

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# FILLING THE ILLINOIS FEDERAL DISTRICT COURT VACANCIES

Carl Tobias\*

## *Abstract*

*President Donald Trump repeatedly argues that appellate court appointments constitute his major success. The President and the United States Senate Republican Party majority have established records by approving fifty very conservative, young, and capable appellate court jurists. However, their confirmations have exacted a toll, particularly from the many federal district courts which address seventy-nine unfilled positions in 677 judicial posts.*

*One constructive illustration has been the three Illinois tribunals which confront five pressing openings. The Administrative Office of the United States Courts classifies three as “emergencies,” because the vacant seats have been protracted and involve substantial case-loads. Despite this circumstance, Trump failed to nominate any Illinois district court candidate before June 2018, while the U.S. Senate only appointed a nominee more than one year later. All openings lacked nominees until recently, mostly because the White House did not resend the Senate three nominees whom Trump had proposed last year until May 2019.*

*District judges comprise the Illinois federal justice regime’s “workhorses” and resolve large dockets, while the ample vacancies pressure Illinois district courts and litigants, conditions that epitomize the nation. Thus, the efforts to fill the abundant openings by*

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\* Williams Chair in Law, University of Richmond. I wish to thank Margaret Sanner for her valuable suggestions, Jane Baber, Emily Benedict, and Jamie Wood for their valuable research, editing, and suggestions, the *Pepperdine Law Review* editors for their valuable research, advice, and editing, Leslee Stone for her exceptional processing, as well as Russell Williams and the Hunton Andrews Kurth Summer Research Endowment Fund for their generous, continuing support. Remaining errors are mine alone. The data which relate to the numbers of nominees, appointees, vacancies, and emergencies were current on December 17, when the piece went to print.

*the President, the Senate, and Democratic lawmakers who represent Illinois—Senator Richard Durbin, the Minority Whip, and Senator Tammy Duckworth—necessitate assessment.*

*Part II of this Article recounts the background of judicial selection, emphasizing the contemporary problem. Part III surveys the practices which Trump and the chamber deploy, detecting that both stress the rapid appointment of conservative, young, and competent appellate court jurists but downplay district level vacancies. He also limits venerable customs which presidents have implemented. The section then evaluates confirmation procedures, finding that the Judiciary Committee deemphasizes important traditions, especially “blue slips”—which stop nominee consideration, unless both home state senators approve candidates—and hearings’ careful arrangement that prior committees had rigorously applied.*

*Part IV considers numerous selection practices’ effects, determining that until November 2019 there were more open district court slots than upon Trump’s inauguration. The emphasis on speedily appointing conservative appellate court judges and deviations from important precedents that had long effectively served White Houses, Senates, and federal courts are undercutting both discharge of the President’s constitutional duties to nominate and confirm accomplished district court judges and fulfillment of the Senate’s constitutional responsibilities to advise and consent on nominees. The massive number and prolonged nature of vacancies concomitantly undermine the judiciary’s responsibility to promptly, economically, and fairly treat significant numbers of filings. However, assiduous executive branch consultation with the Illinois senators, who astutely collaborated, directly fostered the expeditious appointment of two preeminent Seventh Circuit jurists and the careful nomination, although rather lengthy confirmation, of three able, moderate district court nominees.*

*The last section proffers suggestions for the future. Now that President Trump has renominated those strong, mainstream district nominees—who easily won confirmation—he should meaningfully consult with the Illinois senators and revitalize numbers of efficacious concepts from which presidents and senators have gleaned much benefit, to fill every Illinois vacancy. The Senate ought to re-*

*vive venerable measures, robust hearings, rigorous committee discussions, and vigorous confirmation debates. These efforts and successfully filling the Illinois empty district positions could supply instructive guidance for judicial selection across the United States, particularly by showing how ample White House consultation of home state senators and careful collaboration by these politicians can promote the smooth nomination and appointment of highly qualified mainstream appeals court and district court jurists.*

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## I. INTRODUCTION

President Donald Trump incessantly asserts that court of appeals confirmations are his crowning success.<sup>1</sup> The President and the Grand Old Party (GOP) Senate majority have created records by appointing fifty extremely conservative, young, and competent appellate court jurists.<sup>2</sup> Nevertheless, their approvals have inflicted costs, especially on the myriad federal districts throughout the nation, which face seventy-nine vacant positions among 677 judgeships.<sup>3</sup>

One important example has been the multiple Illinois district courts that address five pressing openings.<sup>4</sup> The Administrative Office of the U.S. Courts classifies three as “judicial emergency” vacancies because the unoccupied seats have been prolonged and implicate huge filings.<sup>5</sup> Notwithstanding that situation, Trump marshaled no choice for any Illinois trial level opening until June 2018, while the U.S. Senate only confirmed a district nominee on July 31, 2019.<sup>6</sup> All of the Illinois trial court vacancies were missing nominees until recently, mainly because the White House delayed resubmitting to the upper chamber three nominees whom the administration had proffered last year until this May.<sup>7</sup>

District jurists constitute the Illinois federal justice system’s “work-horses” and treat enormous caseloads, while the abundant openings pressure Illinois courts, litigants, and lawyers, circumstances that exemplify the nation.<sup>8</sup> Thus, the initiatives proposed by the Democratic senators who represent

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1. See, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 16, 2019, 4:21 AM), <https://twitter.com/realdonaldtrump/status/1173557467290247168?lang=en>.

2. *Federal Judges Nominated by Donald Trump*, BALLOTPEDIA, [https://ballotpedia.org/Federal\\_judges\\_nominated\\_by\\_Donald\\_Trump](https://ballotpedia.org/Federal_judges_nominated_by_Donald_Trump) (last visited Oct. 22, 2019).

3. See *Judicial Vacancies*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies> (last updated Nov. 11, 2019) (documenting seventy-nine vacancies for federal district courts in the United States).

4. *Current Judicial Vacancies*, U.S. CTS. (Oct. 29, 2019), <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/current-judicial-vacancies> (last updated Nov. 11, 2019).

5. *Judicial Emergencies*, U.S. CTS. (Oct. 29, 2019), <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/judicial-emergencies> (last updated Nov. 11, 2019).

6. *Martha Maria Pacold*, FED. JUDICIAL CTR. (Oct. 29, 2019), <https://www.fjc.gov/history/judges/pacold-martha-maria>; *Mary Rowland*, FED. JUDICIAL CTR. (Oct. 29, 2019), <https://www.fjc.gov/history/judges/rowland-mary-margaret>.

7. See *Federal Judges Nominated by Donald Trump*, *supra* note 2.

8. See generally *Judicial Vacancies*, ABA, [https://www.americanbar.org/advocacy/governmental\\_legislative\\_work/priorities\\_policy/independence\\_of\\_the\\_judiciary/judicial\\_vacancies](https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/independence_of_the_judiciary/judicial_vacancies) (last updated Nov. 1, 2019) (“When there are insufficient judges to handle the workload, resolution of these

Illinois—Senator Richard Durbin, the Minority Whip, and Senator Tammy Duckworth—to fill these ample vacancies need consideration.

Part II of this Article reviews the history of judicial appointments, stressing the modern conundrum. Part III scrutinizes the procedures which Trump and the chamber employ, indicating that both emphasize the speedy appointment of conservative, young, and capable appellate jurists but deemphasize trial court openings. He also restricts venerable conventions which presidents have instituted. The segment then analyzes confirmation practices, ascertaining that the Judiciary Committee downplays salient traditions, particularly appellate court “blue slips”—which halt nominee processing unless home state politicians approve candidates—and hearings’ careful scheduling that earlier panels had robustly applied.

Part IV canvasses various procedures’ impacts, detecting relatively more empty district slots than upon Trump’s inauguration. The focus on rapidly appointing conservative appellate court jurists and departures from significant precedents that had long effectively served the judiciary are undermining both fulfillment of the President’s constitutional responsibilities to nominate and confirm able trial court judges and discharge of the Senate’s constitutional responsibilities to advise and consent. The mammoth quantity and protracted character of vacancies undercut the judiciary’s duty to expeditiously, inexpensively, and equitably resolve large caseloads. However, active White House consultation with the Illinois senators, who adeptly cooperated, did promote the swift approval of two prominent Seventh Circuit jurists and the cautious nomination and confirmation, albeit rather prolonged, of three accomplished, mainstream district choices.

The last segment posits suggestions for the future. Now that President Trump has renamed those highly competent, moderate district nominees—who smoothly earned approval—he ought to meticulously consult with the Illinois politicians and revive numerous efficacious ideas, from which chief executives and senators have derived considerable benefit, to fill all of the remaining Illinois district court openings. The Senate must revitalize constructive devices—principally rigorous hearings, salutary panel discussions, and robust confirmations debates. These actions generally and eliminating the Illinois unoccupied judicial slots could provide an informative roadmap

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important kinds of cases is delayed. Persistent vacancies in a busy court increase the length of time that litigants and businesses wait for their day in court and increase case backlogs that perpetuate delays in the future. . . . These pressures, if left unchecked, inevitably will alter the delivery and quality of justice and erode public confidence in our federal judicial system.”).

for the nation, especially by demonstrating how avid White House consultation of home state politicians and vigorous cooperation by those senators may facilitate the expeditious nomination and confirmation of well qualified, mainstream appellate court and district court judges.

## II. MODERN SELECTION PROBLEMS

The background to modern judicial selection problems deserves cursory recounting; other writers have already evaluated the relevant history, and the current situation has more relevance.<sup>9</sup> One important attribute is the persistent vacancies difficulty, which results from enhanced federal court jurisdiction, cases, and seats.<sup>10</sup> The other contemporary dilemma is political and can be ascribed to contrasting White House and Senate control which arose four decades ago.

### A. Persistent Vacancies

Lawmakers enlarged federal court jurisdiction beginning in the 1960s,<sup>11</sup> expanding civil actions while federalizing more criminal activity, initiatives which propelled district litigation.<sup>12</sup> Congress responded to growing case-loads with more judicial slots.<sup>13</sup> Over the fifteen years after 1980, judicial

9. E.g., MILLER CTR. OF PUB. AFFAIRS, *IMPROVING THE PROCESS OF APPOINTING FEDERAL JUDGES: A REPORT OF THE MILLER CENTER COMMISSION ON THE SELECTION OF FEDERAL JUDGES* 3 (1996); Gordon Bermant et al., *Judicial Vacancies: An Examination of the Problem and Possible Solutions*, 14 *MISS. C. L. REV.* 319, 320–23 (1994).

10. This attribute merits less comprehensive assessment—delay is intrinsic to the judicial selection process, resists easy solution, and has received considerable treatment. Bermant et al., *supra* note 9, at 333; The Comm. of Fed. Courts, *Remedying the Permanent Vacancy Problem in the Federal Judiciary: The Problem of Judicial Vacancies and Its Causes*, 42 *RECORD ASS'N BAR CITY N.Y.* 374, 377 (1987).

11. MILLER CTR. OF PUB. AFFAIRS, *supra* note 9, at 3; see Carl Tobias, *The New Certiorari and a National Study of the Federal Appeals Courts*, 81 *CORNELL L. REV.* 1264, 1268–70 (1996).

12. E.g., Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994) (codified as amended in 42 U.S.C. ch. 136); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended in 42 U.S.C. ch. 126).

13. 28 U.S.C. §§ 44, 133 (2012) (establishing rules for the appointment, tenure, residence, and salary of appellate court judges (§ 44), and the appointment and number of district court judges (§ 133)); see *Judicial Vacancies*, *supra* note 3.



confirmation times mounted.<sup>14</sup> Appellate court nominations and confirmations consumed, on average, twelve and three months, respectively.<sup>15</sup> The nomination and confirmation processes' substantial numbers of phases and participants make some delay inherent.<sup>16</sup> Presidents consult home state elected officials, pursuing advice on choices, and recommend talented submissions.<sup>17</sup> The FBI diligently undertakes probing background checks.<sup>18</sup> The American Bar Association (ABA) comprehensively examines and rates candidates.<sup>19</sup> The Department of Justice (DOJ) helps survey individuals while rigorously preparing nominees for Senate assessment. The Judiciary Committee analyzes nominees, stages its hearings, discusses choices, and votes; candidates whom the panel reports may acquire floor debates, when required, preceding chamber ballots.

### B. *The Modern Difficulty*

Article II of the U.S. Constitution envisions that senators will alter erroneous nominations, while partisanship has long infected judicial selection.<sup>20</sup> Politicization has distinctly continued, exponentially soaring when President Richard Nixon pledged to deliver "law and order" by forwarding "strict constructionists,"<sup>21</sup> and profoundly increased with U.S. Court of Appeals for the

14. U.S. JUDICIAL CONFERENCE, LONG RANGE PLAN FOR THE FEDERAL COURTS 103 (1995).

15. MILLER CTR. OF PUB. AFFAIRS, *supra* note 9, at 3–4; Bermant et al., *supra* note 9, at 323. Appellate court nominations and confirmations consumed twenty months during 1997, the first year of President Bill Clinton's last term, and 2001, the first year of President George W. Bush's initial term. Carl Tobias, *Curing the Federal Court Vacancy Crisis*, 53 WAKE FOREST L. REV. 883, 887 (2018). Each of these years resembled President Barack Obama's first and last two years. *Id.* at 887 n.16.

16. Bermant et al., *supra* note 9, at 321; Sheldon Goldman, *Obama and the Federal Judiciary: Great Expectations but Will He Have a Dickens of a Time Living up to Them?*, 7 FORUM 1, 11 (2009).

17. *How Judges and Justices are Chosen*, U.S. HIST., <http://www.ushistory.org/gov/9d.asp> (last visited Nov. 5, 2019).

18. DENIS STEVEN RUTKUS, CONG. RESEARCH SERV., THE APPOINTMENT PROCESS FOR U.S. CIRCUIT AND DISTRICT COURT NOMINATIONS: AN OVERVIEW 14 (2016), <https://fas.org/sgp/crs/misc/R43762.pdf>.

19. MILLER CTR. OF PUB. AFFAIRS, *supra* note 9, at 5–6; *see* ABA, STANDING COMM. ON FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS (1983).

20. *See* THE FEDERALIST NO. 76, at 513 (Alexander Hamilton) (Jacob Cooke ed., 1961); MICHAEL GERHARDT, THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL & HISTORICAL ANALYSIS 28 (2000); SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 6 (1997).

21. GOLDMAN, *supra* note 20, at 208; DAVID O'BRIEN, JUDICIAL ROULETTE: REPORT OF THE

District Court of Columbia's Circuit Judge Robert Bork's Supreme Court fight.<sup>22</sup> Mushrooming partisanship, divided government, and the strong hope that the party lacking the White House might regain control and confirm jurists fueled delay. Relatively slow nominations and confirmations may explain the dearth of approvals in the Clinton and Bush presidencies, which the 1997 and 2001 selection processes epitomize.<sup>23</sup> In President Barack Obama's time, the GOP eroded collaboration, demonstrated by its unprecedented refusal to assess Judge Merrick Garland, Obama's esteemed High Court nominee.<sup>24</sup> After the GOP won a chamber majority during November 2014, vowing to effectuate "regular order" again, the Republican majority permitted the confirmation of merely two Obama appellate court nominees and eighteen trial court judges, the least since Harry Truman's presidency, which resulted in more than 100 appellate court and district court openings upon Trump's inauguration, encompassing a lone Illinois seat.<sup>25</sup>

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TWENTIETH CENTURY FUND TASK FORCE ON JUDICIAL SELECTION 20 (1988).

22. *E.g.*, MARK GITENSTEIN, MATTERS OF PRINCIPLE: AN INSIDER'S ACCOUNT OF AMERICA'S REJECTION OF ROBERT BORK'S NOMINATION TO THE SUPREME COURT 1–2 (1992); JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 18, 310 (2007).

23. Tobias, *supra* note 15, at 888–89 (evaluating judicial appointment issues in the Clinton and Bush Administrations).

24. See Robin Bradley Kar & Jason Mazzone, *The Garland Affair: What History and the Constitution Really Say About President Obama's Powers to Appoint a Replacement for Justice Scalia*, 91 N.Y.U. L. REV. ONLINE 53, 56–57, 98–99 (2016), <https://www.nyulawreview.org/wp-content/uploads/2018/08/NYULawReviewOnline-91-Kar-Mazzone.pdf>; Carl Tobias, *Confirming Supreme Court Justices in a Presidential Election Year*, 94 WASH. U. L. REV. 1093 (2017).

25. This occurred because Illinois was President Obama's home state and the senators cooperated with his White House and filled openings by deploying an effective bipartisan merit selection commission, which reviewed applications, interviewed highly-qualified candidates, and tendered recommendations to the senators, who correspondingly submitted recommendations to the White House. *Confirmation Listing*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/confirmation-listing> (last updated Nov. 5, 2019); 163 CONG. REC. S8,022–24 (daily ed. Dec. 14, 2017) (statements of Sens. Durbin, Feinstein & Leahy); see Carl Tobias, *The Republican Senate and Regular Order*, 101 IOWA L. REV. ONLINE 12, 13 (2016), <https://ilr.law.uiowa.edu/online/volume-101/the-republican-senate-and-regular-order/> (defining "regular order" and discussing the Republican Senate majority's failure to restore irregular order).

## III. TRUMP ADMINISTRATION JUDICIAL SELECTION

A. *Nomination Process*

Over the course of the election campaign, Trump vowed to nominate ideological conservatives.<sup>26</sup> The Chief Executive acutely honored those promises by nominating and confirming Justice Neil Gorsuch and Justice Brett Kavanaugh and many similar court of appeals nominees—yet he made comparatively few analogous district court nominations.<sup>27</sup> The President confirmed a record twelve appellate court judges the first year of his presidency, with even more during the second.<sup>28</sup>

Trump applies a few vaunted traditions but omits or deemphasizes numerous effective conventions. For instance, Trump accords—as each contemporary president has—chief responsibility to White House Counsel (formerly Donald McGahn and currently Patrick Cipollone), related duties to the Department of Justice, and important responsibility for district court vacancies to home state politicians, while Trump’s emphasis is the appeals courts.<sup>29</sup> When sending appellate court picks, the White House Counsel accentuates conservatism and youth while emphasizing the “short list” of potential Supreme Court prospects whom the Federalist Society and the Heritage Foundation assembled.<sup>30</sup> Those ideas control now because the Federalist Society’s

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26. Carl Tobias, *President Trump and Federal Bench Diversity*, 74 WASH. & LEE L. REV. ONLINE 400, 410 (2018), <https://scholarlycommons.law.wlu.edu/wlulr-online/vol74/iss2/7>.

27. *Id.*; see also *Confirmation Listing*, *supra* note 25 (documenting Trump’s nominations during his tenure so far).

28. *Confirmation Listing*, *supra* note 25 (presenting a chart of Trump’s nominations, including those in 2017–19). Trump appointed eighteen more circuit judges in 2018 and has confirmed twenty additional court of appeals judges so far this year. See *id.*

29. Cf. Carl Tobias, *Senate Gridlock and Federal Judicial Selection*, 88 NOTRE DAME L. REV. 2233, 2239 (2013) (describing Obama’s approach to the judicial selection process); Michael S. Schmidt & Maggie Haberman, *McGahn, Soldier for Trump and Witness Against Him, Leaves White House*, N.Y. TIMES (Oct. 17, 2018), <https://perma.cc/R62E-EYCN> (last visited Nov. 4, 2019) (describing Trump’s tweet which announced the departure of McGahn, who served as the initial White House Counsel, and the appointment of Patrick Cipollone, who serves as the second White House Counsel).

30. Charlie Savage, *Courts Reshaped at Fastest Pace in Five Decades*, N.Y. TIMES, Nov. 12, 2017, at A1; see also Donald F. McGahn II, *A Brief History of Judicial Appointments From the Last 50 Years Through the Trump Administration*, 60 WM. & MARY L. REV. ONLINE 105, 105–08 (2019) (describing the way that judicial nominations have been made and how the Senate has confirmed nominees in the last half century and how nominations and confirmations operated in the Trump Administration).

Executive Vice President, Leonard Leo,<sup>31</sup> helps Trump, who stresses appellate court nominations, as the appeals courts comprise tribunals of last resort for virtually all filings, create more policy than district courts, and issue rulings that cover several jurisdictions.<sup>32</sup> His appellate court nominees are quite conservative, young, and capable.

Nonetheless, this Chief Executive ignores or dilutes valuable traditions. One example is the meaningful consultation with politicians about home state openings, a convention which recent presidents distinctly adopted; that was a central reason for blue slips, which only permitted hearings when both home state politicians dutifully returned slips in Obama's presidency.<sup>33</sup> Democratic legislators alleged that the first White House Counsel actually consulted negligibly about vacant court of appeals slots in jurisdictions which they represent, and McGahn responded that the Constitution does not expressly allude to consultation.<sup>34</sup> Most relevantly, a number of Democratic lawmakers argued that Trump marshaled appellate court nominees without "adequate consultation," although the White House Counsel appeared to robustly consult the Illinois Senators Durbin and Duckworth—who astutely deployed a bipartisan selection panel which fostered cooperation—before Trump recommended able, mainstream nominees for two openings on the Seventh Circuit and four vacancies on Illinois district courts.<sup>35</sup>

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31. See Robert O'Harrow & Shawn Boburg, *A Conservative Activist's Behind-the-Scenes Campaign to Remake the Nation's Courts*, WASH. POST (May 21, 2019), <https://www.washingtonpost.com/graphics/2019/investigations/leonard-leo-federalists-society-courts/>; Zoe Tillman, *After Eight Years on the Sidelines, This Conservative Group is Primed to Reshape the Courts Under Trump*, BUZZFEED NEWS (Nov. 20, 2017), <https://www.buzzfeednews.com/article/zoetillman/after-eight-years-on-the-sidelines-this-conservative-group>.

32. See CONG. REC., *supra* note 25 (providing a statement from Senator Feinstein regarding Trump's conservative nominations). *But see* Tobias, *supra* note 29, at 2240–41 (describing Obama's bipartisan approach to judicial nominations). See generally GOLDMAN, *supra* note 20 (discussing the selection process for nominating and confirming federal appellate court and district court judges in the administrations of all presidents who served between Franklin Roosevelt and Ronald Reagan).

33. See Salvador Rizzo, *Are Senate Republicans Killing 'Blue Slip' for Court Nominees?*, WASH. POST (Feb. 21, 2018), <https://www.washingtonpost.com/news/fact-checker/wp/2018/02/21/are-senate-republicans-killing-blue-slip-for-court-nominees/>. See generally *Judicial Vacancies*, *supra* note 8 (describing the policy and practice of "blue slips").

34. Thomas Kaplan, *Trump is Putting Indelible Conservative Stamp on Judiciary*, N.Y. TIMES, (July 31, 2018), <https://www.nytimes.com/2018/07/31/us/politics/trump-judges.html>; Zoe Tillman, *Here's How Trump Is Trying to Remake His Least Favorite Court*, BUZZFEED NEWS (Mar. 16, 2018), <https://www.buzzfeednews.com/article/zoetillman/heres-who-the-white-house-pitched-for-the-federal-appeals>.

35. Tobias, *supra* note 15, at 898, 911–12, 912 n.166; 164 CONG. REC. S2,635 (daily ed. May 14,

A related deviation from many long precedents was Trump's resolve to end American Bar Association involvement with selection. Presidents after Dwight Eisenhower, save Bush, carefully invoked ABA evaluations and rankings in designating candidates, and Obama refrained from picking everyone whom it deemed not qualified.<sup>36</sup> Trump has chosen nine appellate court and district court aspirants who earned that rating; the Senate has confirmed seven of these nominees, and the ABA duly ranked most Illinois designees well qualified.<sup>37</sup>

Trump essentially relies on more customary practices when suggesting district aspirants. For instance, he, like recent presidents, employs home state politician submissions while premising manifold nominations on competence to address many cases, as Illinois certainly shows.<sup>38</sup> Numerous prospects are talented candidates who enjoy high ABA ratings,<sup>39</sup> but some withdrew, and Trump instructed GOP members to cast negative votes on any whom they believe unqualified.<sup>40</sup>

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2018) (statement of Sen. Durbin, Member, S. Comm. on the Judiciary); see *Hearing to Consider Pending Nominations Before the S. Comm. on the Judiciary*, 115th Cong. (Aug. 22, 2018), <https://www.judiciary.senate.gov/meetings/08/22/2018/nominations> (suggesting how White House Counsel collaboration with home state senators, such as that witnessed for Illinois appellate court and district court vacancies, could make honoring appellate slips less important).

36. Adam Liptak, *White House Cuts A.B.A. Out of Judge Evaluations*, N.Y. TIMES, Apr. 1, 2017, at A16; see CONG. REC., *supra* note 25 (touting the value of ABA evaluations and ratings and Obama's refusal to nominate candidates whom the ABA rated not qualified). *But see infra* note 65 and accompanying text (Sen. Grassley strongly arguing that the ABA is an external "political organization" that should not dictate Judiciary Committee scheduling); *Hearing to Consider Pending Nominations Before the S. Comm. Judiciary* (Oct. 30, 2019), <https://www.judiciary.senate.gov/meetings/10/30/2019/nominations> (Sen. Mike Lee (R-UT) criticizing the ABA as a liberal political organization and recommending that the White House and the Justice Department end cooperation with the ABA in the selection process).

37. *Standing Committee on the Federal Judiciary: Ratings of Art. III and Art. IV Judicial Nominees*, ABA, [https://www.americanbar.org/content/dam/aba/administrative/government\\_affairs\\_office/webratingchart-trump116.pdf?logActivity=true](https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/webratingchart-trump116.pdf?logActivity=true) (last updated Oct. 30, 2019); see Tobias, *supra* note 15, at 893.

38. See *supra* notes 35–37 and accompanying text; see also Carl Tobias, *Recalibrating Judicial Renominations in the Trump Administration*, 74 WASH. & LEE L. REV. ONLINE 9, 18–19 (2017) (discussing how President Trump should consult and cooperate with home state politicians who should cooperate with him). *But see* Seung Min Kim, *Trump's Judge Picks: 'Not Qualified,' Prolific Bloggers*, POLITICO (Oct. 18, 2017), <https://www.politico.com/story/2017/10/17/trump-judges-nominees-court-picks-243834>.

39. Texas District Judges Walter Counts and Karen Gren Scholer are valuable examples. See *supra* note 38 and accompanying text.

40. Tobias, *supra* note 15, at 894; Tom McCarthy, *Judge Not: Five Judicial Nominees Trump Withdrew—and Four Pending*, GUARDIAN (Mar. 10, 2019), <https://www.theguardian.com/law/2019/>

The Chief Executive violates or downplays efficacious tools. One predicament with trial court selection is minimally prioritizing the seventy-nine vacancies—forty-seven implicate judicial emergencies—in the haste to quickly confirm abundant exceedingly conservative, young appellate court jurists.<sup>41</sup> Trump promotes fewer judges in states represented by Democrats, even though the jurisdictions face many judicial emergencies—notably, California’s rampant fifteen, New York’s substantial six, and Illinois’ problematic three.<sup>42</sup> The last jurisdiction confronted as many as seven empty posts, but Trump failed to provide any nomination until May 2018, has yet to propose a single nominee for four of the empty posts, and neglected to confirm a single jurist until the week of this August’s chamber recess.<sup>43</sup> In February of last year, Trump proffered Northern District of Illinois Judge Amy St. Eve combined with practitioner Michael Scudder, and they won prompt, felicitous Seventh Circuit appointment.<sup>44</sup> That June, the Chief Executive nominated Martha Pacold, Mary Rowland, and Steven Seeger, and a year later nominated John Kness whom Trump continues to champion, all mustered for the Northern District of Illinois.<sup>45</sup>

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mar/10/judge-not-five-judicial-nominees-trump-withdrew-and-four-pending.

41. There is merely one appellate court vacancy, and the opening is an emergency; emergencies skyrocketed nationally from twelve to as many as eighty-six. *Judicial Emergencies*, *supra* note 5. District court openings overall are twelve percent and the single appellate court vacancy is fewer than one percent. *Id.*

42. *Id.* (documenting California’s, New York’s, and Illinois’ judicial emergency vacancies). *But see President Donald J. Trump Announces Ninth Wave of Judicial Nominees and Tenth Wave of United States Attorney Nominees*, WHITE HOUSE, OFF. PRESS SEC’Y (Dec. 20, 2017), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-ninth-wave-judicial-nominees-tenth-wave-united-states-attorney-nominees> (naming more in “blue” states); *infra* notes 102, 109.

43. Empirical data which the Administrative Office of the United States Courts, the federal courts’ administrative arm, collects, analyzes, and synthesizes suggest that the Republican Senate majority assigns “red” states priority. *Judicial Vacancies*, *supra* note 3 (documenting that merely one in 179 U.S. Courts of Appeals judgeships is vacant); *Confirmation Listing*, *supra* note 25 (in two-GOP senator states, confirming ninety-six appellate court and district court judges and nominating 108 appellate court and district court candidates; in two-Democratic senator states, confirming thirty-five appellate court and district court judges and nominating fifty-three appellate court and district court candidates); *see also infra* note 79 and accompanying text.

44. *See Tobias*, *supra* note 15, at 911–12, 912 n.166 (discussing Amy St. Eve’s and Michael Scudder’s nominations and “easy” confirmations).

45. *President Donald J. Trump Announces Fifteenth Wave of Judicial Nominees, Fourteenth Wave of United States Attorney Nominees, and Ninth Wave of United States Marshal Nominees*, WHITE HOUSE, OFF. PRESS SEC’Y (June 7, 2018), <https://www.whitehouse.gov/presidential-actions/presi->

A constructive regime which Trump has eschewed or deemphasized is improving minority judicial representation.<sup>46</sup> For example, he implemented nominal action to pursue, canvass, and confirm accomplished, conservative ethnic minorities or lesbian, gay, bisexual, transgender, and queer (LGBTQ) appellate court and district court choices by, for instance, using diverse selection employees or insisting that home state legislators tender numbers of minorities.<sup>47</sup> Among Trump's 170 confirmees, twenty-two are persons of color and one is a lesbian.<sup>48</sup> Among 228 marshaled nominees, thirty-four comprise ethnic minorities—sixteen Asian-Americans, eight Latino/as, and nine African-Americans (although no one in the last ethnic group received nomination for a court of appeals vacancy), and one Jamaican—while merely two nominees constitute LGBTQ people.<sup>49</sup> Of the Illinois aspirants, two excellent sug-

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dent-donald-j-trump-announces-fifteenth-wave-judicial-nominees-fourteenth-wave-united-states-attorney-nominees-ninth-wave-united-states-marshall-nominees/; *President Donald J. Trump Announces Judicial Nominations*, WHITE HOUSE, OFF. PRESS SEC'Y (Apr. 8, 2019), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-judicial-nominations/> (re-nominating judicial candidates Pacold, Rowland, and Seeger); *Three Nominations Sent to the Senate*, WHITE HOUSE, OFF. PRESS SEC'Y (May 6, 2019), <https://www.whitehouse.gov/presidential-actions/three-nominations-sent-senate-4/>; *President Donald J. Trump Announces Judicial Nominees*, WHITE HOUSE, OFF. PRESS SEC'Y (June 11, 2019), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-judicial-nominees-3/> (nominating judicial candidate Kness); 165 CONG. REC. S5,228, S5,230 (daily ed. July 31, 2019) (confirming Rowland & Pacold); 165 CONG. REC. S5,434 (daily ed. Sept. 11, 2019) (confirming Seeger).

46. See Carl Tobias, *President Trump's War on Federal Judicial Diversity*, 54 WAKE FOREST L. REV. 531 (2019); Michael Nelson & Rachel Hinkle, *Trump Appoints Lots of White Men to Be Federal Judges: Here's Why It Matters*, WASH. POST (Mar. 13, 2018), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/03/12/trump-appoints-lots-of-white-men-to-be-federal-judges-heres-why-it-matters>.

47. LGBTQ is openly disclosed sexual preference that a number of candidates, nominees, and judges may have not divulged. LGBTQ persons are considered "minorities" in this piece. See *infra* note 63.

48. Tobias, *supra* note 46, at 555–56 & n.121; see also Danielle Root et al., *Building a More Inclusive Judiciary*, CTR. FOR AM. PROGRESS (Oct. 3, 2019), <https://www.americanprogress.org/issues/courts/reports/2019/10/03/475359/building-inclusive-federal-judiciary/> (reporting that only 16%, or twenty-nine, of Trump's nominees to date were non-white).

49. Tobias, *supra* note 48, at 557 (documenting that only two nominees were "LGBTQ persons"); Hailey Fuchs, *Democrats Question the Absence of Black or Hispanic Nominees Among Trump's 41 Circuit Court Nominees*, WASH. POST (July 8, 2019, 3:17 PM), [https://www.washingtonpost.com/politics/democrats-question-absence-of-black-or-hispanic-nominee-among-trumps-41-circuit-court-judges/2019/07/08/e8a50d06-98e9-11e9-a027-c571fd3d394d\\_story.html](https://www.washingtonpost.com/politics/democrats-question-absence-of-black-or-hispanic-nominee-among-trumps-41-circuit-court-judges/2019/07/08/e8a50d06-98e9-11e9-a027-c571fd3d394d_story.html).

gestions comprise women: Pacold is Asian-American, while Rowland is a lesbian; but, the chamber delayed their appointments.<sup>50</sup>

### B. Confirmation Process

The confirmation system resembles the nomination process' deleterious elements in specific ways, principally by eliminating or modifying rules and traditions which have long functioned well.<sup>51</sup> This is shown by selective amendments of (1) the century-old policy for blue slips—which allow committee hearings only when both home state lawmakers present slips—and (2) panel hearings.<sup>52</sup>

In fall 2017, Chuck Grassley (R-IA), as then-Chair of the Judiciary Committee, articulated a new “circuit exception” for persons without the blue slips of two politicians who represent states in which vacancies arise, especially when slip retention derives from “political or ideological” opposition.<sup>53</sup> Grassley altered the slip concept to which *both* the Republican and Democratic parties had strictly adhered for eight years in Obama’s presidency, the most recent, salient precedent.<sup>54</sup> This situation clearly deteriorated when the Chair decided to process numerous aspirants—even though Trump marginally consulted—and Grassley negligibly justified according the Chair (himself) major responsibility for determining whether Trump had adequately consulted.<sup>55</sup> Grassley and Lindsey Graham (R-SC), his successor as the Chair of

50. In April, Trump renamed both, who earned July 31 confirmation. *See supra* note 45 and accompanying text; *infra* note 111 and accompanying text.

51. *See* Tobias, *supra* note 15, at 897.

52. *Id.*

53. 163 CONG. REC. S7,174 (daily ed. Nov. 13, 2017); 163 CONG. REC. S7,285 (daily ed. Nov. 16, 2017); *Hearing to Consider Pending Nominations Before the S. Comm. on the Judiciary*, 115th Cong. (Nov. 29, 2017), <https://www.judiciary.senate.gov/meetings/11/29/2017/nominations> (statement of Sen. Chuck Grassley, Chair, S. Comm. on the Judiciary); Carl Hulse, *Judge's Death Gives Trump a Chance to Remake a Vexing Court*, N.Y. TIMES (Apr. 7, 2018), <https://www.nytimes.com/2018/04/07/us/politics/trump-reinhardt-ninth-circuit.html>.

54. As Chair, Grassley stringently enforced that blue slip policy across Obama’s final two years, and Patrick Leahy (D-VT) strictly applies this policy throughout the first six years. *Executive Business Meeting Before the S. Comm. on the Judiciary*, 115th Cong. (Feb. 15, 2018), <https://www.judiciary.senate.gov/meetings/02/15/2018/executive-business-meeting> (statements of Sens. Grassley, Chair, & Leahy, Member, S. Comm. on the Judiciary); *see* Carl Tobias, *Senate Blue Slips and Senate Regular Order*, 37 YALE L. & POL’Y REV. INTER ALIA 1, 1–2 (2018).

55. *E.g.*, *Executive Business Meeting Before the S. Comm. on the Judiciary*, *supra* note 54 (statements of Sens. Feinstein & Leahy, Members, S. Comm. on the Judiciary); *see* Tobias, *supra* note 54, at 23–26 (discussing the idea that little precedent supports the notion of a circuit exception); *see also*



the Judiciary Committee, would not respect Democrats' blue slips for appellate court nominees,<sup>56</sup> although substantial positive White House consultation of the Illinois senators apparently promoted two Seventh Circuit nominees' expeditious appointments.<sup>57</sup>

Grassley proclaimed that blue slips were meant to ensure that the White House consults politicians in jurisdictions where openings materialize and to safeguard those lawmakers' prerogatives in court appointments, but the experienced legislator honored home state politicians' retention of district court slips.<sup>58</sup> Nevertheless, Republican members had persistently deployed slips to peremptorily exclude Obama's superb, consensus appeals court nominees across 2016 for political or ideological reasons, the exact bases which Grassley as Chair had decried as illegitimate.<sup>59</sup>

Republicans, as the Senate majority party, essentially have responsibility for the confirmation dilemmas, as the GOP changed and diluted effective hearing rules and traditions. During Trump's presidency, Republicans have provided *fifteen* hearings for two circuit and four trial court nominees, which plainly lacked the minority's assent; that notion sharply contrasted to *three*

*supra* notes 34–35 and accompanying text.

56. *Hearing to Consider Pending Nominations Before the S. Comm. on the Judiciary*, 116th Cong. (Feb. 13, 2019), <https://www.judiciary.senate.gov/meetings/02/13/2019/nominations> (statement of Sen. Graham, Chair, S. Comm. on the Judiciary) (characterizing opposition from New York Senators Chuck Schumer and Kirsten Gillibrand to two New York Second Circuit nominees, Joseph Bianco and Michael Park, as an "ideological dispute" and, therefore, conducting a hearing on those nominees who easily secured confirmation); *see supra* note 22 and accompanying text (discussing the refusal to honor slips).

57. *See supra* notes 35, 44 and accompanying text. The Illinois senators tendered blue slips on every Trump appellate court and district court nominee, principally because the White House has assiduously consulted the Illinois senators, who have adeptly cooperated by employing a bipartisan merit selection commission that helps the senators recommend highly qualified, mainstream candidates to the White House. *See supra* note 46 and accompanying text.

58. *See supra* note 54 and accompanying text. Graham, who became Chair in January, vowed to follow Grassley's appellate court and district court blue slip policy, doing so with New York appellate court and district court picks. *Executive Business Meeting Before the S. Comm. on the Judiciary*, 116th Cong. (Feb. 7, 2019), <https://www.judiciary.senate.gov/meetings/02/07/2019/executive-business-meeting>; *see supra* note 56; *Eight Nominations and Three Withdrawals Sent to the Senate*, WHITE HOUSE, OFF. PRESS SEC'Y (Sept. 19, 2019), <https://www.whitehouse.gov/presidential-actions/eight-nominations-three-withdrawals-sent-senate/> (documenting the withdrawal of Northern District of New York nominee Thomas Marcelle purportedly because Sen. Gillibrand did not return her blue slip); Robert Gavin & Mike Goodwin, *Gillibrand Blocked Judge's Nomination to the Federal Bench*, ALB. TIMES UNION (Aug. 29, 2019), <https://www.timesunion.com/news/article/U-S-Attorney-in-Albany-picked-for-federal-14397720.php>.

59. Many Republican senators offered no reasons for blocking the nominees. Tobias, *supra* note 15, at 899 & n.89.

analogous hearings coming in Obama's eight years—and then, for unusual situations, with Republican party consent.<sup>60</sup> Most sessions—including that for an Eighth Circuit nominee, three Illinois district court nominees, and two additional district court aspirants—on none of which the minority party concurred—were extremely oversubscribed, yet both Illinois Seventh Circuit jurists' smooth confirmations arguably had somewhat greater relevance.<sup>61</sup> Certain panel hearings were so packed that senators had no time for probing questions.<sup>62</sup> Sessions, especially involving these people, seemed accelerated while lacking enough care for persons who may assume life tenure.<sup>63</sup>

One significant deviation from regular order was Chair Grassley's decision to revamp waiting on ABA input *before* hearings, and even votes, despite incessant requests from Dianne Feinstein (D-CA), the Judiciary Committee Ranking Member, to have American Bar Association evaluations and ratings *following* the work's conclusion.<sup>64</sup> Grassley asserted that the exogenous political organization should not drive panel scheduling.<sup>65</sup> It, thus, was unsurprising that virtually all of the more controversial nominees acquired party-line reports.<sup>66</sup>

60. *Id.* at 899 & n.91.

61. See *Hearing to Consider Pending Nominations Before the S. Comm. on the Judiciary*, *supra* note 35 (furnishing little time for probing queries). For similarly packed hearings, see *Hearing to Consider Pending Nominations Before the Senate Committee on the Judiciary*, *supra* note 56; Tobias, *supra* note 15, at 901. *But see* Tobias, *supra* note 15, at 911–12 (providing the example of the smooth appellate court hearing and the expeditious, felicitous confirmation process for Seventh Circuit nominees St. Eve and Scudder).

62. See, e.g., *Hearing to Consider Pending Nominations Before the S. Comm. on the Judiciary*, *supra* note 56; *Hearing to Consider Pending Nominations Before the S. Comm. on the Judiciary*, *supra* note 35 (furnishing little time for probing queries); see *Executive Business Meeting Before the S. Comm. on the Judiciary*, 116th Cong. (Apr. 4, 2019), <https://www.judiciary.senate.gov/meetings/04/04/2019/executive-business-meeting> (suggesting that Democrats lacked sufficient resources to prepare when Senate members were considering substantial numbers of nominees).

63. Senators had five minutes to pose queries. See *supra* notes 34, 62 (demonstrating the lack of care discussed). Many appellate court and district court nominees delayed by repeating queries, deflecting queries, or refusing to say whether they would recuse in cases about issues on which they had worked or held extreme views, as seen in a third of Trump nominees having anti-LGBTQ records. Tobias, *supra* note 15, at 900.

64. *Id.* at 900–01.

65. *Id.* at 901 & n.102. The ABA delivered evaluations and ratings on four New York district court nominees on their hearing date but submitted examinations and rankings subsequently for two additional nominees who testified at the hearing, *id.* at 901; however, the ABA delivered evaluations and ratings for Illinois appellate court and district court nominees in a timely manner and they were strong. See *supra* notes 35, 37.

66. Tobias, *supra* note 15, at 901 & n.103.

Once nominees secure committee approval, similar dimensions limit effective review: Democrats require cloture votes and demand roll call ballots on myriad nominees; Democratic *and* Republican party senators constantly vote in lockstep; and marshaling the 2013 “nuclear option” means that nominees can win appointment on majority ballots.<sup>67</sup> Elemental were pushing four appellate court judges’ debates and chamber votes into one 2017 week<sup>68</sup> and pursuing six court of appeals jurists’ confirmations over a 2018 week; both transpired after rather cryptic notice.<sup>69</sup> Many floor debates’ anemic quality resembles that in panel discussions.<sup>70</sup>

Republican senators prioritize appellate court over district court appointments, closing non-emergency and red-state court vacancies while approving conservative white males.<sup>71</sup> This inattention was not warranted, as district court judges constitute the federal bench’s workhorses and resolve most litigation, the emergency category applies in extraordinary circumstances, senator party affiliation and Trump’s political maneuvers ought not dictate court judicial resource distribution, and minority jurists supply numerous benefits.<sup>72</sup>

67. Carl Tobias, *Filling the D.C. Circuit Vacancies*, 91 IND. L.J. 121 (2015). Cloture ballots and roll call votes may stop nominees who lack the requisite qualifications; majority confirmation votes can appoint strong judges. The actions mirror which political party controls the presidency and the Senate. *Id.* at 135 & n.132.

68. *Schedule for Tuesday, Oct. 31, 2017*, U.S. SENATE DEMOCRATS (OCT. 30, 2017), <https://www.democrats.senate.gov/2017/10/30/schedule-for-tuesday-october-31-2017>; *Schedule for Thursday, Oct. 26, 2017*, U.S. SENATE DEMOCRATS (OCT. 25, 2017), <https://www.democrats.senate.gov/2017/10/25/schedule-for-thursday-october-26-2017>.

69. *Schedule for Pro Formas and Monday, May 7, 2018*, U.S. SENATE DEMOCRATS (April 26, 2018 05:38 PM), <https://www.democrats.senate.gov/2018/04/26/schedule-for-pro-formas-and-monday-may-7-2018>; *Schedule for Thursday, April 26, 2018*, U.S. SENATE DEMOCRATS (April 25, 2018, 7:31 PM), <https://www.democrats.senate.gov/2018/04/25/schedule-for-thursday-april-26-2018>; see Tobias, *supra* note 15, at 902 (suggesting that Democrats’ possessed limited resources to address the many appellate court nominees and their substantial records). *But see supra* note 35 and accompanying text.

70. See sources *supra* notes 60–63; 165 CONG. REC. S2,220 (daily ed. Apr. 3, 2019) (documenting that Republicans detonated the nuclear option to reduce district nominee post-cloture debate time from thirty to two hours); Burgess Everett & Marianne Levine, *McConnell Preps New Nuclear Option to Speed Trump Judges*, POLITICO (Mar. 6, 2019), <https://www.politico.com/story/2019/03/06/trump-mcconnell-judges-1205722>.

71. These priorities in the confirmation regime mirror the nominating system. See *supra* notes 28–37, 41–50. One of two Illinois Seventh Circuit confirmees is a white male, one of three Northern District of Illinois confirmees is and two of four district court nominees are. *Federal Judges Nominated by Donald Trump*, *supra* note 2.

72. See *supra* notes 38, 41–43, 45 and accompanying text; *infra* notes 78–88 and accompanying text.

Those problems were multiplied by the pressing need to fill the High Court vacancy and the 103 appellate court and district court openings at Trump's inauguration, each of which Senator Mitch McConnell (R-KY), the Senate Majority Leader, clearly instigated.<sup>73</sup>

These priorities helped Trump set the court of appeals confirmation record across his first half term, but left twenty-plus district court nominees without confirmation, large openings at 2017's completion and more upon the next year's conclusion, emergencies to profoundly grow, and few "blue" state or minority confirmees.<sup>74</sup> Illinois' vacant positions rose from one to seven; judicial emergencies profusely increased from none to four; Trump only seated district court judges on July 31, 2019; all trial level candidates whom the panel approved lacked confirmation at 2018's close but were only resent to senators during this May; and Pacold and Rowland now comprise the sole minority appointees.<sup>75</sup>

In the end, the Illinois appellate court and district court nominee packages' constituents might explain why Trump delayed renaming several district nominees with reports and how four open posts can still be missing nominees. He may have provided two appeals court nominees, while the senators apparently proffered most trial court nominees.<sup>76</sup> In short, Trump expeditiously proposed and confirmed two appellate court judges with trades, and he confirmed three district jurists over a year later, but seemingly delayed or reneged on multiple additional district court vacancies.<sup>77</sup>

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73. Charles Homans, *Mitch McConnell Got Everything He Wanted. But at What Cost?*, N.Y. TIMES, Jan. 27, 2019, at SM 35; Michael Cohen, *Mitch McConnell, Republican Nihilist*, N.Y. REV. BOOKS (Feb. 25, 2019), <https://www.nybooks.com/daily/2019/02/25/mitch-mcconnell-republican-nihilist>; see MITCH MCCONNELL, *THE LONG GAME: A MEMOIR* (2016).

74. For 2017, see U.S. Senate, Exec. Calendar, Issue No. 188 (Dec. 23, 2017), [https://www.cop.senate.gov/legislative/LIS/executive\\_calendar/2017/12\\_23\\_2017.pdf](https://www.cop.senate.gov/legislative/LIS/executive_calendar/2017/12_23_2017.pdf); *supra* notes 41–50, 71–72. For 2018, see 165 CONG. REC. D3 (daily ed. Jan. 3, 2019); *Judicial Vacancies*, *supra* note 3.

75. He did confirm them, Seeger, and two able Seventh Circuit judges. See *supra* text accompanying notes 35, 44–45.

76. Sending slips for two appellate court and four district picks suggests consultation works. See *infra* notes 119–21.

77. For additional information on issues which trades and bipartisan courts raise, see Tobias, *supra* note 15, at 915–18; Zoe Tillman, *The White House Has Pitched a Nominee for Manhattan's Powerful US Attorney Opening*, BUZZFEED NEWS (Aug. 7, 2017), <https://www.buzzfeednews.com/article/zoe-tillman/the-white-house-has-pitched-a-nominee-for-manhattans>. Trump also appeared to torment senators who represent California, Illinois, and New York by slowly renaming nominees on whom the White House and the senators had agreed. See, e.g., Carl Tobias, *Filling the California Ninth Circuit Vacancies*, 92 S. CAL. L. REV. POSTSCRIPT 83, 99 (2018); see also *Judicial Vacancies*, *supra* note 3.

## IV. IMPLICATIONS

The nomination and confirmation processes' assessment reveals that central ideas, which Trump and the chamber employ, manifest adverse consequences. Notable markers include the seventy-nine empty trial level seats, forty-seven of which implicate emergencies (large numbers affecting both parameters come from states that Democrats represent), and the minuscule number of nominees and confirmees who comprise minorities—several nuanced points that Illinois exemplifies.<sup>78</sup> In fact, until August, the data had eclipsed the 103 openings, forty-two of which involved emergencies, at Trump's inauguration.<sup>79</sup> The phenomena cause harmful ramifications.<sup>80</sup> They squeeze parties and district courts, which must expeditiously, inexpensively, and equitably resolve substantial numbers of filings.<sup>81</sup> District judges conclude ample civil litigation, and criminal suits receive precedence in the Speedy Trial Act.<sup>82</sup>

Certain particulars—seventy-nine vacant district slots, five plaguing Illinois, rampant emergencies and comparatively few minority appointees, numbers of whom could proffer much—show the necessity to confirm additional

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(suggesting that the Republican Senate majority established red-state priorities in confirmations); Hailey Fuchs, *As Democrats Debated Without Mentioning Federal Judges, the Senate Confirmed 13 More Trump Nominees*, WASH. POST (Aug. 1, 2019), [https://www.washingtonpost.com/powerpost/as-democrats-debated-without-mentioning-federal-judges-13-more-trump-nominees-got-confirmed/2019/08/01/d61ccdbc-b465-11e9-8949-5f36ff92706e\\_story.html](https://www.washingtonpost.com/powerpost/as-democrats-debated-without-mentioning-federal-judges-13-more-trump-nominees-got-confirmed/2019/08/01/d61ccdbc-b465-11e9-8949-5f36ff92706e_story.html) (“[T]he Senate confirmed 13 of President Trump’s judicial nominees, giving Republicans a remarkable 144 judicial appointments since his inauguration and allowing him to reshape the courts and their decisions for decades, filling them with conservative jurists.”); Tobias, *supra* note 15, at 906–08 (discussing the implications of the confirmation process).

78. See *Judicial Emergencies*, *supra* note 5; *supra* notes 41–50 and accompanying text.

79. Thirteen district court nominees captured appointment at the August recess. Fuchs, *supra* note 77; see also Tobias, *supra* note 15, at 906–07 (showing that vacancies worsened, even as status changes by judges slowed).

80. See Tobias, *supra* note 15, at 907–08 (“This inattention to diversity’s expansion constitutes a lost opportunity for increasing the quality of justice that litigants need.”).

81. FED. R. CIV. P. 1; Patrick Johnston, *Problems in Raising Prayers to the Level of Rule: The Example of Federal Rule of Civil Procedure 1*, 75 B.U. L. REV. 1325, 1326–27 (1995). District jurists are the sole judges whom most litigants face; protracted vacancies deprive parties and judges of needed resources.

82. Speedy Trial Act of 1974, 18 U.S.C. §§ 1261–3174; see Joe Palazzolo, *In Federal Courts, the Civil Cases Pile Up*, WALL STREET J. (Apr. 6, 2015), <https://www.wsj.com/articles/in-federal-courts-civil-cases-pile-up-1428343746>; see also Gary Fields & John R. Emshwiller, *As Criminal Laws Proliferate, More Are Ensnared*, WALL STREET J. (July 23, 2011), <https://www.wsj.com/articles/SB10001424052748703749504576172714184601654>.

diverse jurists.<sup>83</sup> Persons of color and LGBTQ individuals can now appear overrepresented vis-à-vis the criminal justice system and essentially underrepresented on the judiciary.<sup>84</sup> Illinois has perennially been quite diverse, which compels enhanced minority representation. Inattention to diversity was a lost opportunity for expanding the quality of justice that litigants need. More representation supplies advantages. Numerous people of color, women, and LGBTQ jurists clearly supply different, informative views<sup>85</sup> that encompass issues regarding abortion, criminal procedure, and other complex questions that federal judges decide.<sup>86</sup> They may restrict ethnic, gender, and sexual preference biases that undermine justice.<sup>87</sup> Tribunals that directly reflect the United States population's diversity also improve respect for courts by demonstrating that persons of color, women, and LGBTQ choices serve as effective jurists.<sup>88</sup>

No important reason could justify the failure to augment diversity. For example, many conservative, accomplished people of color, women, and LGBTQ individuals—namely Trump confirmees Gren Scholer, Terry Moorer, and Fernando Rodriguez, conjoined with excellent Northern District of Illinois Judges Pacold and Rowland, who did not capture appointment until July 31—significantly erode the idea that confirming ethnic minority, female, and LGBTQ nominees reduces merit.<sup>89</sup> His confirmees and nominees to-date

83. See *Judicial Vacancies*, *supra* note 3 (showing the comparatively small number of diverse appellate court nominees and the rather substantial number of judicial emergency vacancies in the federal district courts).

84. Tobias, *supra* note 15, at 907 (“The federal courts have been an emblematic locus for justice where individuals of color, particularly African Americans, Latinos/as, and Native Americans, experience significant overrepresentation in the criminal justice process, and minorities, women, and LGBTQ individuals correspondingly encounter too little judicial representation.”).

85. See Theresa M. Beiner, *The Elusive (But Worthwhile) Quest for a Diverse Bench in the New Millennium*, 36 U.C. DAVIS L. REV. 597, 610–15 (2003); John McCain & Jeff Flake, *Federal Judge Diane Humetewa*, 40 HUM. RTS., no. 4, 2015, at 22.

86. See Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1776, 1778 (2005). *But see* Stephen J. Choi et al., *Judging Women*, 8 J. EMPIRICAL LEGAL STUD. 504, 511 (2011).

87. See, e.g., FINAL REPORT OF THE NINTH CIRCUIT TASK FORCE ON RACIAL, RELIGIOUS & ETHNIC FAIRNESS 9 (1997); FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 169 (1990), <https://www.fjc.gov/sites/default/files/2012/RepFCSC.pdf>.

88. Sylvia R. Lazos Vargas, *Only Skin Deep?: The Cost of Partisan Politics on Minority Diversity of the French Bench*, 83 IND. L.J. 1423, 1442 (2008); Jeffrey Toobin, *The Obama Brief*, NEW YORKER (Oct. 27, 2014), <https://www.newyorker.com/magazine/2014/10/27/obama-brief>.

89. Tobias, *supra* note 15, at 909 (documenting more able, conservative female confirmees); *see also supra* notes 46–53.

indicate that plenty of superb, diverse candidates furnish merit *and* conservatism. Trump need only realize this potential.

The Chief Executive's violation and deemphasis of critical rules and customs by quickly approving substantial numbers of conservative, young appellate court judges undercut the discharge of presidential constitutional responsibilities to nominate and appoint jurists for the manifold district level openings. Rapid confirmation of analogous choices by diluting blue slips and eschewing or confining related profitable notions undermines fulfillment of senators' duties to advise and consent regarding nominees. The remarkable quantity and protracted character of trial level vacancies may concomitantly impede the judiciary's swift, economical, and fair disposition of much pressing litigation.<sup>90</sup>

In sum, Trump has nominated plentiful appeals court and district court candidates and seated many appellate court jurists who are exceptionally conservative, young, and capable; but, he and the chamber rejected and downplayed cogent approaches, which have recently promoted confirmations, and this subjected district courts to seventy-nine openings, forty-seven of which constitute judicial emergencies. Illinois addresses five district vacancies, three comprising emergencies; Trump appointed no trial level judge before late July. Thus, the final part surveys practices which might remedy the jurisdiction's numerous district court vacancies.

## V. SUGGESTIONS FOR THE FUTURE

Trump must capitalize on efficacious techniques; the President invokes some. One was renominating three district court picks with committee reports whose nominations expired in January, but drew April renewal.<sup>91</sup> That concept was efficient; those designees have already received intensive panel, FBI,

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90. See *supra* notes 81–82 and accompanying text. Incessant ideological emphasis in the judicial selection process can make federal judges resemble politicians and erode public trust. Tonja Jacobi & Matthew Sag, *The New Oral Argument: Justices as Advocates*, 94 NOTRE DAME L. REV. 1161, 1186–88 (2019) (discussing the negative effects of political polarization and the potential to undermine public trust in the federal judiciary); *Executive Business Meeting Before the S. Comm. on the Judiciary*, 116th Cong. (Mar. 7, 2019), <https://www.judiciary.senate.gov/meetings/03/07/2019/executive-business-meeting/>; e.g., Diane Laviolette, *Trump Judge Casts the Deciding Vote Denying Parents the Benefits for the Accidental Death of Their Son*, PEOPLE FOR AM. WAY: BLOG CONFIRMED JUDGES, CONFIRMED FEARS (Nov. 4, 2019), <http://www.pfaw.org/blog-posts/trump-judge-casts-the-deciding-vote-denying-parents-the-benefits-for-the-accidental-death-of-their-son-confirmed-judges-confirmed-fears/>.

91. He renominated fifty-four nominees this January but only sent the Senate April nominees on

and ABA scrutiny, which only required cursory updating—and they compile easily detected, thorough records—while the nominees must win only committee and chamber votes, which all did.<sup>92</sup> This procedure is effective. Illinois surely needs each trial court jurist to increase justice. Fairness also can mandate that nominees receive prompt analysis, every constituent of the Trump-home-state lawmaker trade be honored, and his continuous political machinations and correspondingly senator party affiliation not dictate court judicial resource dissemination.<sup>93</sup>

A similar mechanism on which Trump plainly relies is elevating numbers of able, consensus magistrate judges whom Article III jurists in the district courts approve for eight-year stints.<sup>94</sup> The concept is pragmatic and equitable because these nominees compile accessible, complete records and bring impressive expertise.<sup>95</sup> Illustrations include Moorer, one accomplished, diverse Trump confirmer, and Rowland, his exceptional, centrist Northern District of Illinois appointee.<sup>96</sup>

Trump should revitalize or improve the efficacious constructs that he jettisons and deemphasizes. Crucial would be assertively consulting home state politicians, as White House Counsel robustly did to appoint the Illinois Seventh Circuit judges and perhaps certain Northern District of Illinois selections; this practice effectively facilitates many nominations and confirmations and is the blue slip's major purpose.<sup>97</sup> Relevant was effortlessly nominating the four competent, moderate Illinois district court aspirants.<sup>98</sup> Thus, much vigorous consultation will not always surface the parties' strongest preferences

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May 21. See *supra* note 45.

92. All three, who earned hearings in the previous Congress, did not need another. Tobias, *supra* note 15, at 911.

93. See *supra* notes 35, 44–45 and accompanying text. Presidents and senators must honor their constituents of deals which they consummate or the agreements will unravel. See, e.g., Burgess Everett & Marianne Levine, *Josh Hawley Rattles Republicans as He Derails GOP Judge*, POLITICO (June 12, 2019), <https://www.politico.com/story/2019/06/12/josh-hawley-republican-judges-1362687>.

94. See *President Donald Trump Announces Fifteenth Wave of Judicial Nominees*, *supra* note 45 (demonstrating Trump's reliance on elevating Illinois magistrate judges with the appointment of Mary M. Rowland as an Article III judge to the Northern District of Illinois).

95. See 28 U.S.C. § 631 (2012); Tobias, *supra* note 15, at 910 (analyzing elevation). They also have FBI background checks.

96. See *supra* notes 45, 50, 75, 89 and accompanying text.

97. See *supra* notes 34–35, 44–45 and accompanying text; *supra* text accompanying notes 55–59.

98. Three had smooth panel approval, no floor vote and April renaming. *Executive Business Meeting Before the S. Comm. on the Judiciary*, 116th Cong. (June 20, 2019), <https://www.judiciary.sen.gov>



but could essentially spark more fine nominations—as the Illinois appellate court and trial court processes show—and may resolve disagreements that can erode the processes and interparty cooperation.<sup>99</sup> Those attributes suggest the exigency for reignition of discussions related to (1) immediately confirming the one district court nominee and (2) expediting confirmations to the four additional open district posts which have yet to experience nominees but must realize them soon.

Trump should reexamine persistently appointing such a substantial number of conservative appeals court jurists, which is the predominant explanation for the seventy-nine unfilled district positions and Illinois' seven until this July's conclusion, while carefully reviewing activities to diminish the vacancies. For example, he might prioritize nominees who may remedy the Illinois emergencies.<sup>100</sup> Trump could also stress the five Illinois district court openings,<sup>101</sup> which might rectify the paucity of blue state confirmees and nominees.<sup>102</sup>

The President can enhance diversity, furnishing the benefits that Pacold and Rowland clearly epitomize, which Illinois deserves.<sup>103</sup> Trump could expand representation and convey to all citizens and judicial selection participants that he supports greater diversity. The White House Counsel may lead this action, communicating that representation should have preference analogous to conservatism. The importuning's appropriate emphasis will be his staff, the Justice Department, the Senate Judiciary Committee, and the Illinois

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ate.gov/meetings/06/20/2019/executive-business-meeting; *Three Nominations Sent to the Senate*, *supra* note 45.

99. *See supra* notes 34–35, 42–43, 53–56 and accompanying text (documenting numerous Democratic senators' disagreements with the Trump White House).

100. *See supra* notes 42–43, 71–75 and accompanying text.

101. *See Judicial Vacancies*, *supra* note 3 (showing five Illinois district openings). California confronts fifteen, New York faces ten and New Jersey addresses six. *Id.* (showing the number of judicial vacancies remaining across the U.S. in district and appellate courts, including those in California, New York, and New Jersey).

102. He should continue following proposals of strong picks tendered by senators who represent jurisdictions where vacancies arise, but the highly qualified, mainstream Illinois appellate court and district court nominees and confirmees arguably suggest that Trump and the Senate may need expert ABA input less than other jurisdictions. *See Tobias*, *supra* note 15, at 901 & n.103; *supra* notes 36–41 and accompanying text.

103. *See supra* notes 50, 85–88 and accompanying text.

politicians, who enlarge diversity by conscientiously seeking out and recommending numerous preeminent, conservative minority attorneys.<sup>104</sup> The White House Counsel next must interview and forward these candidates, asking that Trump seriously consider naming all. Trump then might nominate while cautiously persuading legislators to favor and efficiently canvass the nominees.

In short, Trump and the chamber must evaluate near-term ideas which may eliminate Illinois district court vacancies and ease the prolonged confirmation wars. The latter are reflected with (1) his limited consultation and dilatory renomination of three trial level choices and substantially delayed nomination of four other candidates for comparatively longstanding district court vacancies, (2) Democrats' rare concurrence about chamber ballots and their demand for voluminous cloture and roll call confirmation ballots, and (3) the Republican Senate majority's change of appeals court slips and trial level nominees' post-cloture debate hours.<sup>105</sup> Multiple complications suggest that 2019 is past time for effectuating strictures which permanently improve the faltering judicial selection rules and conventions.<sup>106</sup>

Trump and the chamber might alter the current system with a bipartisan judiciary that permits the specific party which lacks the executive to recommend some percentage of candidates.<sup>107</sup> New York senators first deployed

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104. See *supra* notes 25, 35, 44 (documenting the Illinois senators' bipartisan merit selection commission's panel efforts and the lawmakers' endeavors); see also Carl Tobias, *Appointing Lesbian, Gay, Bisexual, Transgender and Queer Judges in the Trump Administration*, 96 WASH. U. L. REV. ONLINE 11, 16, 20–22 (2018), <https://cdn.wustllawreview.org/wp-content/uploads/Tobias-Formatted.pdf?x10937> (evaluating New York senators' efforts and proffering additional ideas that can enhance diversity).

105. See Tobias, *supra* note 24, at 1107; John Gramlich, *Federal Judicial Picks Have Become More Contentious, and Trump's Are No Exception*, PEW RES. CTR. (Mar. 7, 2018), <https://www.pewresearch.org/fact-tank/2018/03/07/federal-judicial-picks-have-become-more-contentious-and-trumps-are-no-exception>; *supra* notes 34–35, 53–57, 67, 70, 74–75.

106. Longer-term ideas need 2020 adoption, as limited clarity on who might win presidential and senatorial elections offers incentives to agree. For numerous additional longer-term concepts, see Tobias, *supra* note 29, at 2255–65; Michael L. Shenkman, *Decoupling District from Circuit Judge Nominations: A Proposal to Put Trial Bench Confirmations on Track*, 65 ARK. L. REV. 217, 298–311 (2012).

107. See Michael J. Gerhardt, *Judicial Selection As War*, 36 U.C. DAVIS L. REV. 667, 688 (2003); Carl Tobias, *Fixing the Federal Judicial Selection Process*, 65 EMORY L.J. ONLINE 2051, 2056 (2016), [http://law.emory.edu/elj/\\_documents/volumes/65/online/tobias.pdf](http://law.emory.edu/elj/_documents/volumes/65/online/tobias.pdf).

that avenue.<sup>108</sup> Illinois provides a contemporary example.<sup>109</sup> What the state recently fashioned may be viewed as bipartisan courts.<sup>110</sup> For instance, Trump apparently chose the two appellate court nominees and the senators seemingly proposed many district court submissions. The appeals court nomination and confirmation processes operated relatively well, and the district court selection procedures worked rather felicitously, albeit slowly; yet, the confirmation practices for most district aspirants seemed to perform less collaboratively—Trump ameliorated somewhat the last concern with April renomination of the three nominees, who then captured late June panel votes and July 31 confirmation.<sup>111</sup>

The bipartisan judiciary must become effective in 2021.<sup>112</sup> That approach's creation will supply benefits. It would afford each party incentives to coordinate in the selection process, jurists who bring diverse experience, ideology, ethnicity, gender, and sexual preference, and much-needed judicial resources for the courts. Adoption before November 2020 with implementation during the subsequent year will decrease the possibility that either Republicans or Democrats can realize unfair advantage; but, this might need care,<sup>113</sup> as institution may be complex.<sup>114</sup>

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108. Tobias, *supra* note 15, at 915–16. The New York senator whose party lacked the White House originally tapped one in four candidates, which subsequently became one in three picks. *Id.* at 915–16 n.182.

109. Pennsylvania, Florida, and New York use similar regimes. *Id.* at 916; *see also supra* notes 44–45, 50, 77 (agreeing on four California, seven New York, and three Illinois district court nominees whom Trump renominated in January and April).

110. *See supra* note 35 and accompanying text (discussing the nomination process which is employed in Illinois).

111. *See Executive Business Meeting Before the S. Comm. on the Judiciary, supra* note 98. For more specifics on a bipartisan judiciary and trading, such as the possibility of senators and Trump each proposing two candidates to fill Illinois district court vacancies, *see supra* notes 45, 77, 107 and accompanying text.

112. *See supra* note 106 and accompanying text. When the parties agree *before* elections, they do not know which may benefit.

113. Tobias, *supra* note 15, at 917–18 (analyzing a number of the particular issues that can arise with a bipartisan judiciary).

114. Congress can address specific concerns. *See id.* at 918. Some conventions, encompassing votes on substantial numbers of excellent, consensus district nominees at Senate recesses, could help to restore regular order. *Cf.* Tobias, *supra* note 54, at 31 (“Democratic and Republican party members should follow recent slip procedures deployed in President Obama’s years and codify them in the panel rules.”).

Should those activities prove ineffective, because the GOP undercuts Democrats' judicial selection endeavors,<sup>115</sup> the minority party could apply a number of relatively dramatic remedies. Promising ideas emanate from blue slips, despite problematic restraints which govern appellate courts.<sup>116</sup> Democrats might wish to retain slips regarding numerous district court picks from home states until Trump proposes any candidates whom they may support. The Illinois politicians encouraged his renaming of the three nominees, which Trump finally did, but Illinois has four other empty trial level slots that they can insist persons whom each senator recommends fill.<sup>117</sup> Another potential solution is trades.<sup>118</sup> For example, the Illinois court packages suggest that Trump and the lawmakers proffered several prospects.<sup>119</sup> He confirmed two appellate court jurists favored by the legislators, who apparently sent most trial court picks.<sup>120</sup> Nevertheless, "judge trading" might foster detrimental effects, as the President could only rename in April three district court submissions who had 2018 panel reports and confirm two at July's close with a third in early September and has yet to proffer one nominee who may be seated in four existing openings, but the appellate court possibilities did win fast appointment.<sup>121</sup> Similar issues plague Senate effort's "boycotting," which can

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115. Slowly renominating three district court nominees, delay in nominating four additional district court prospects, and not honoring appellate court slips demonstrate Republican Senate majority erosion of Democrats' work and selection process rules and customs. *See supra* note 98 and accompanying text.

116. *See supra* notes 53–57. I rely below on ideas espoused by Christopher Kang, who headed much of Obama's judicial selection effort. Jeremy Stahl, *Republicans Are Abolishing Judicial Appointments Norms Again*, SLATE (Feb. 22, 2019), <https://slate.com/news-and-politics/2019/02/trump-judicial-appointments-mcconnell-democrats-chris-kang.html>.

117. Democrats may also retain all district court slips until Republicans agree to honor appellate court slips. Stahl, *supra* note 116; *see also* Everett, *supra* note 70 (discussing Sen. Schumer's offer to honor appellate court slips for two-hour district court nominee debates but the Republican Senate majority refused); *supra* notes 34–35, 53–57. Collective action's leverage with seventy-nine district court and one appellate court opening may prompt Republicans to agree. *See* Stahl, *supra* note 116 (discussing Democrats' power to withhold district court blue slips, by which Sen. Graham has frequently stated he would abide).

118. *See* Tobias, *supra* note 15, at 915–18; *supra* notes 44–45, 77, 107 and accompanying text.

119. Trades, bipartisan courts, and the above paragraph's concepts overlap. *See supra* notes 107–17.

120. Judge St. Eve was a Bush district court appointee who seems rather centrist, as does Judge Scudder. Tobias, *supra* note 15, at 911–12, 912 n.166; *see supra* notes 57, 76–77 (showing that consulting works). The district nominees are more moderate.

121. *See* Tobias, *supra* note 29, at 2260 (providing an example of judge trading); Everett, *supra* note 93 (providing a more recent example); *supra* notes 43–44, 57, 76–77, 111. Even if Trump nominates candidates to fill the four vacancies, the Senate would confirm them after many other nominees,

publicize and clarify GOP obstruction's negative impacts, although boycotts could seem defeatist and the predicaments they cause might surpass the benefits.<sup>122</sup>

## VI. CONCLUSION

President Trump and the Senate have exacerbated the confirmation wars raging across the country, particularly states which Democratic senators represent. Illinois has been a prominent front, which exquisitely illuminates the system-wide miasma, prominently exemplified by his delayed renaming of the three district court nominees and failure to marshal nominees for the multiple remaining trial court vacancies that currently lack nominees. However, the White House appeared to meaningfully consult the Illinois senators, who actively cooperated when deftly and easily helping choose and confirm two able, consensus Illinois appeals court nominees and rather expeditiously forwarded three highly talented, mainstream district court nominees; all of these district candidates recently won confirmation. Thus, the President and senators must collaborate to promptly approve the one nominee left while implementing concerted actions that confirm accomplished, moderate judges to the other four unoccupied slots. Those endeavors can fill all Illinois district court openings, enable it to avoid certain pitfalls which numbers of states have encountered, and map a constructive route for bipartisan appointments nationwide.

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if at all, because plentiful nominees are currently in the queue and 2020 is a presidential election year when confirmations slow and halt. Thus, trades should be reserved for dire situations.

122. Thus, boycotts ought to be a last resort. *See* Stahl, *supra* note 116.